

## Remarks

Applicants respectfully request reconsideration of the present U.S. Patent application as amended herein. Claims 12, 23, 29 have been amended. No claims have been added or canceled. Thus, claims 1-31 are pending.

Regarding the Objections to the Specification, the typographical error introduced of page 12 has been corrected. Regarding the Objections to Claims 23 and 28, the phrase "at least on part" has been corrected to "at least in part."

## **35 USC §112**

Claim 1-21 and 23-25 stand rejected under §112 as failing to comply with the written description requirement, in particular for failing to teach the amended limitation of determining efficiency based at least in part on a predicted reliability rating associated with a server. Applicants are puzzled by the rejection as the Specification discussion at page 11 for FIG. 7 (second paragraph), for example, states:

In one embodiment, the communication efficiency ratings stored in the tracking data correspond to measured communication delays between the client and a network host 106-112 maintaining the tracking data. **In one embodiment, efficiency ratings factor in past and/or predicted reliability of a host.**

See also the following discussion in the Specification. Thus, clearly, the Specification supports the amendments towards predicted reliability and hence Applicants require the Office to withdraw this rejection.

Regarding the claim 12 rejection, the clerical error in the preamble has been corrected so that it corresponds with claim 1.

Regarding the claim 23 rejection, the commas – introduced to make the claim more easily readable – have been removed to make clear first contacting is by the client to the first server and second contacting is by the first server to the second server.

Regarding the rejection of claim 29, the clerical error has been corrected.

The Examiner is thanked for the careful attention to detail in the present matter. While it is not so heartening to see so many clerical errors, the Examiner's obvious attention to this matter is greatly appreciated as it can only lead to a better patent.

### **35 USC §103**

Claims 1-5, 8, 10, 12-15 and 20 stand rejected over the combination of Watson (US Patent No. 6,223,209), Farber (US Patent No. 6,415,280), and Cherkasova (US Patent No. 6,360,270).

Regarding these rejections, Applicants respectfully traverse the rejections; while many arguments may be made with respect to these rejections, one is the simple failing of the documents relied on by the Office to teach the claimed subject matter as suggested by the Office. As is well understood, to render the claims obvious, the Office must find combinable references that if combined, teach all elements of the rejected claims. And, the Office may not simply apply hind sight reasoning and impermissibly construct a piecemeal argument based on Watson, Farber and Cherkasova to force a combination of references teaching the recited elements of claim 1.

Claim 1 recites “determining a second efficiency rating **for communication** ... based in part on a predicted reliability rating.” This element is **not** a recitation of disjoint operations, e.g., this element does not recite separately determining efficiency, and then

separately predicting reliability; rather the element recites determining an efficiency rating based in part on predicted reliability. **In general**, the rejections fail because the Office erroneously treats the determination of efficiency and the predicted reliability separately, instead of as treating reliability as a component of the efficiency as recited.

The Office admits neither Watson nor Farber teach predicting reliability. The Office also states in connection with Cherkasova “using reliability ratings to determine whether a server should be accessed is **well known**”. When the Office relies on what is asserted to be general knowledge to negate patentability, that knowledge **must** be articulated and placed on the record. The Office does so by pointing to Cherkasova as teaching “using predicted reliability ratings to determine whether a server **should be accessed**.” Applicants respectfully note that even if this is a correct characterization of Charkasova, **this is not what is claimed**.

Instead, claim 1 recites determining an efficiency rating **for communication** based in part on a predicted reliability rating, where server access (e.g., to where a client is directed) may be based on determined efficiency. Access is **not** directly predicated on reliability as attributed by the Office to Cherkasova. Hence, even if we assume for the sake of argument that Cherkasova teaches as suggested by the Office, this teaching does not and can not cure the Office’s admitted deficiencies of Watson and Farber. Thus, the suggested combination is unworkable and therefore the rejections **must** be withdrawn for at least this failing of Cherkasova.

Claim 1 also recites “providing a first efficiency rating for communication between the first server and the client”. The Office points to Watson col. 3 lines 64-67 as

teaching this element of claim 1. Applicants disagree and point out that as discussed in the specification regarding FIG. 7, "efficiency ratings ... can be an average, moving average, or other statistic or heuristic measurement of actual communication performance with the client, and therefore account for real-time disturbances in communication data paths between the client and network hosts." Watson is not put forth by the Office as teaching such a refined efficiency rating. Instead Watson is put forth as teaching router hops and bandwidth. This is not as robust an evaluation as the recited efficiency rating, hence Applicants submit that Watson does not teach as suggested by the Office and therefore the rejections must be withdrawn.

Regarding the Office's comments on page 7 of the Action regarding "a person of ordinary skill in the art would have readily recognized the desirability and advantages of ... measured reliability to select which server should admit ..." and "using a predicted reliability rating as taught by Cherkasova, because using such a rating will most likely give more accurate results regarding expected reliability" Applicants traverse the statements since they are unsubstantiated generalizations that do not accurately reflect what is claimed. In particular, as discussed above, predicted reliability is not used as attributed to Cherkasova to determine expected reliability. Similar generalizations are presented elsewhere in the Action and Applicants respectfully traverse each of these generalizations in so far as they are not substantiated.

Regarding dependent claims 2-5, 8, and 10, due to the apparent fundamental misunderstanding by the Office of characteristics of claim 1, the rejections of these claims are not being substantively reviewed at this time as it is necessary to first resolve

the understanding and rejection/allowance of claim 1. However, it is noted these claims are allowable for at least the reason as depending from an allowable base claim.

Regarding the rejections of claims 12-15 and 20, these claims are rejected on the same grounds as for claims 1-5, 8 and 10 and hence Applicants submit these claims are allowable for at least the same reasons as discussed above for those claims.

Regarding the rejection of dependent claims 7, 17, and 18 as obvious over the lengthy combination of Watson, Farber, Charkasova and O'Neil (U.S. Patent No. 6,128,279), Applicants traverse the rejections. O'Neil is presented as teaching a peer-to-peer system that "shares server capability information ... among all of the servers." It is respectfully noted that such a peer environment does not teach the recited common accessible storage device, e.g. a shared drive or other shared medium. In fact, the proffered peer system teaches away from the recited embodiments since peers have their own separate storage. Hence the rejections are incorrect and must be withdrawn.

Regarding claim 18, the Office points to Watson at col. 4 lines 12-24 as teaching the recited "communication channel different from the network." It is respectfully noted that use of the "traceroute" utility or any other utility for that matter has absolutely no bearing on the recited use of a communication channel different from the network! Traceroute is an application program that uses the network connection; Applicants do not understand how this application program is equated by the Office to be a different communication channel. Applicants respectfully submit that the rejection is overcome and request passage to issuance of claim 18.

Dependent claims 11, and 21 stand rejected as being obvious over the lengthy combination of Watson, Farber, Cherkasova and Logan (U.S. Patent No. 6,578,066). To allow prosecution to focus on the allowability of the base independent claims, the rejections of these claims are not being substantively reviewed at this time. However, it is noted these claims are allowable for at least the reason as depending from an allowable base claim.

Claims 22-23, 26-28 also stand rejected as being obvious over the lengthy combination of Watson, Farber, Cherkasova and Logan (U.S. Patent No. 6,578,066). Regarding claim 22, as discussed above with respect to claim 1, neither Watson nor Farber does teach the recited first efficiency rating of communication between the client and the first server (the number of hops is not what is recited). Consequently, for this reason alone, the rejection fails and must be withdrawn. However, as also discussed above with respect to claim 1, Watson, Farber and Cherkasova all fail to teach or suggest the recited "second efficiency rating of communication between the client and the second server, wherein said determining the second efficiency rating is based in part on a predicted reliability rating associated with the second server." **Satellite closeness is not a teaching of predicted reliability.**

Due to the failings of Watson, Farber and Cherkasova it is not necessary to substantively review the application of Logan to the recited embodiments. That is, regardless of the teachings of Logan, it does not cure the deficiencies of Watson, Farber and Cherkasova. Hence it is submitted that the rejections are overcome and it is respectfully requested that these claims pass to issuance.

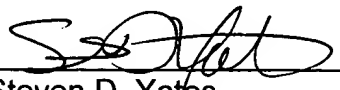
Dependent claims 6, 9, 16, 19 stand rejected as being obvious over the lengthy combination of Watson, Farber, Cherkasova and Emens (U.S. Patent No. 6,606,643). As discussed above with respect to claim 1, neither Watson, Farber nor Cherkasova teach as suggested by the Office. Due to the failings of Watson, Farber and Cherkasova it is not necessary to substantively review the application of Emens to the recited embodiments. That is, regardless of the teachings of Emens, it does not cure the deficiencies of Watson, Farber and Cherkasova. Hence it is submitted that the rejections are overcome and it is respectfully these claims pass to issuance.

Conclusion

For at least the foregoing reasons, Applicants submit that the rejections have been overcome. Therefore, claims 1-31 are in condition for allowance and such action is earnestly solicited. The Examiner is respectfully requested to contact the undersigned by telephone if such contact would further the examination of the present application. Please charge any shortages and credit any overcharges to our Deposit Account number 02-2666.

Respectfully submitted,

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